

REMARKS/ARGUMENTS

Claims 1, 4, 5, 10-18, and 42-66 remain in this application. Claims 1, 42, 49, and 57 were amended as indicated. New claims 62 - 65 were added. Claims 2, 9, 19-26, 28-41 have previously been cancelled. Claims 3, 6-8, and 27 have previously been withdrawn.

Applicant is filing this amendment along with a Request for Continued Examination (RCE), and the appropriate fee, Applicant therefore respectfully requests that the rejections raised in the February 19, 2009 Final Office Action be reconsidered in light of the amendments and following remarks.

Support for the amendments to the claims can be found throughout the specification. More specifically, support for the phrase "incubating the array in a humid chamber" (in claims 1, 42, 49, and 57) can be found at page 13, lines 8-11. Support for the phrase "to enable lateral fluidity of the lipids" can be found at page 13, lines 8-11; and page 12, lines 1-11. Support for the amendments to claims 49, 57, and newly added claims 62 and 63 can be found at page 12, line 30 - page 13, line 14. Support for newly added claims 64 and 65 can be found at page 8, lines 7-9. Support for newly added claim 66 can be found at page 12, lines 7-11.

Official Notice

As a preliminary matter, Applicant respectfully traverses the Examiner's apparent use of official notice. Page 3 of the Final Office Action states that "The biological membrane microspots comprise a membrane bound protein such as G-protein coupled receptors or G-proteins (para. 0009), which would bind to toxins such as C5a anaphylatoxin and pertussis toxins." It is assumed that the citation of "para 0009" in that sentence is referring to U.S. Publication No. 2002/0094544 (*Fang*). Paragraph 0009 of *Fang* does not provide any information about G-protein coupled receptors other than their mention. After reviewing *Fang*, Applicant notes that no information regarding G-protein coupled receptors binding or not binding toxins is provided in *Fang*.

Applicant therefore assumes that the Examiner is taking Official Notice of this apparent fact. According to MPEP § 2144.03, "official notice without documentary evidence to support an examiner's conclusion is permissible only in some circumstances" and should

be rare when an application is under final rejection (MPEP § 2144.03(A)). It should only be done with the facts asserted to be well-known, or to be common knowledge in the art are capable of instant and unquestionable demonstration as being well-known (MPEP § 2144.03(A)). It is specifically noted that it is not appropriate with respect to “assertions of technical facts in the areas of esoteric technology”. *Id.*

Applicant respectfully asserts that the knowledge that G-protein coupled receptors or G-proteins would bind to toxins such as C5a anaphylatoxin and pertussis toxin is not information that is “capable of instant and unquestionable demonstration as being well-known”. Therefore, Applicant respectfully requests that the Examiner produce authority in support of this statement.

§ 112 Rejection

4. The Examiner has rejected claims 1, 4-5, 10-18, and 42-61 under 35 U.S.C. § 112, second paragraph, as allegedly being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention. Applicant respectfully traverses this rejection.

Although Applicant does not concede the correctness of this rejection, claims 1, 42, and 57 were amended to include the recitation of incubating the array in a humid chamber. It is believed, based on the comments in the Final Office Action, that this amendment should sufficiently address this rejection. Applicant therefore respectfully requests that this rejection be withdrawn.

§ 102 Rejections

8. The Examiner has rejected claims 42-48, 53, 54, and 57-61 under 35 U.S.C. § 102(e) as allegedly being anticipated by U.S. Publication No. 2002/0094544 (*Fang*). Applicant respectfully traverses this rejection.

According to the Board of Patent Appeals and Interferences, “Anticipation under 35 U.S.C. § 102(e) requires that ‘each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.’” (*Ex Parte Michel E. Brown and Charles T. Perusse, Jr.* 2008 WL 4371685, Appeal 2007-1950, (BPAI, September 24,

2008) citing *In re Robertson*, 169 F.3d. 743, 745 (Fed. Cir. 1999) (quoting *Verdegaal Bros., Inc. v. Union Oil Co.*, 814 F.2d 628, 631 (Fed. Cir. 1987)). “[R]ejections under 35 U.S.C. § 102 are proper only when the claimed subject matter is identically disclosed or described in ‘the prior art.’” (*Id.* citing *In re Arkley*, 455 F.2d 586, 587 (CCPA 1972)).

Applicant respectfully asserts that *Fang* fails to disclose each element of claims 42, 49, and 57. Specifically, with respect to claims 49, and 57 Applicant asserts (as noted above) that *Fang* does not disclose a “toxin-binding moiety”; and with respect to claims 49 and 57, *Fang* does not disclose the steps of “applying a composition ... comprising ...lipids” and “incubating the substrate in... toxin-binding moiety”. As *Fang* does not provide any disclosure related to toxins, it therefore does not provide any disclosure of a toxin-binding moiety.

With respect to claim 42, *Fang* does not disclose “incubating the array in a humid chamber to enable lateral fluidity of the lipids”. Enabling lateral fluidity of the lipids is discussed in Applicant’s specification at least at paragraphs 0040 and 0041. *Fang* provides no disclosure regarding lateral fluidity of the lipids and certainly doesn’t provide any disclosure of the lipids having lateral fluidity.

Because *Fang* fails to disclose at least one element of claims 42, 49, and 57, it fails to anticipate independent claims 42, 49, and 57; and also fails to anticipate claims 43-48, 53, 54, and 58-61. Applicant therefore respectfully requests that this rejection be withdrawn. Applicant notes that there may be other reasons why claims 42, 49, and 57 are not anticipated by *Fang* and independent reasons why claims 43-48, 53, 54, and 58-61 are not anticipated; Applicant does not concede any such argument by not presenting it herein.

§ 103 Rejections

19. The Examiner has rejected claims 1, 4, 10-16, 18, 52, 57-58, 60, and 61 under 35 U.S.C. § 102(e) as being anticipated by *Fang*, in view of U.S. Publication No. 2003/0124572 (*Umek*). Applicant assumes a typographic transpositional error and that this rejection should instead recite 35 U.S.C. § 103 and will be address as such. Applicant respectfully traverses this rejection.

The USPTO Board of Appeals and Interferences recently held in *Ex Parte Karoleen B. Alexander* (Appeal 2007-2693, Application No. 10/757,116, Decided November 30, 2007,

2007 WL 4239164): “Obviousness requires a suggestion of all the elements in a claim (citing *CFMT Inc. v. Yieldup Int’l Corp.*, 349 F. 3rd 1333, 1342 (Fed. Cir. 2003)) and ‘a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does’ (citing *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007)).” See *Ex Parte Alexander* at 3, emphasis added. Applicant respectfully asserts that *Fang* and *Umek* do not disclose all of the elements of the rejected claims and even if they did, there would have been no reason for one of ordinary skill in the art to combine the elements of *Fang* and *Umek* in the way suggested by the Final Office Action.

Applicant reiterates and incorporates herein the above comments regarding *Fang* with respect to claims 1, 49, and 57, and respectfully asserts that *Umek* does not remedy the shortcomings of *Fang*. Applicant therefore respectfully requests that this rejection be withdrawn. Applicant also notes that there may be other reasons why claims 1, 49, and 57 are not obvious over *Fang* and *Umek*, and independent reasons why claims 4, 10-16, 18, 52, 58, 60, and 61 are not obvious over *Fang* and *Umek*; Applicant does not concede any such arguments by not presenting them herein.

4. The Examiner has rejected claims 4-5 under 35 U.S.C. § 103 as allegedly being unpatentable over *Fang* in view of *Umek*, as applied to claim 1 above, and further in view of U.S. Patent No. 5,922,594 (*Lofas*). Applicant respectfully traverses this rejection.

Applicant reiterates the comments above regarding *Fang* with respect to claim 1 and respectfully asserts that neither *Umek*, *Lofas*, nor their combination remedies the shortcomings of *Fang*. Applicant respectfully requests that this rejection be withdrawn. Applicant also notes that there may be other reasons why claim 1 is not obvious over *Fang*, *Umek*, and *Lofas*, and independent reasons why claims 4 and 5 are not obvious over *Fang*, *Umek*, and *Lofas*; Applicant does not concede any such arguments by not presenting them herein.

Conclusion

Based upon the above amendments, remarks, and papers of records, applicant believes the pending claims of the above-captioned application are in allowable form and patentable

Appl No.: 10/602242
Response dated: April 30, 2009
Office Action dated: February 19, 2009

over the prior art of record. Applicant respectfully requests that a timely Notice of Allowance be issued in this case.

Applicant believes that no extension of time is necessary to make this Reply timely. Should applicant be in error, applicant respectfully requests that the Office grant such time extension pursuant to 37 C.F.R. § 1.136(a) as necessary to make this Reply timely, and hereby authorizes the Office to charge any necessary fee or surcharge with respect to said time extension to the deposit account of the undersigned firm of attorneys, Deposit Account 03-3325.

Please direct any questions or comments to John L. Haack at (607) 974-3673.

Respectfully submitted,

DATE: April 30, 2009



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